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Supreme Court, U.S.
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No. 10-537

IN THE

Supreme Court of the United States

OSAGE NATION,

Petitioner,

v.

CONSTANCE IRBY, SECRETARY-MEMBER OF THE OKLAHOMA TAX COMMISSION; THOMAS E. KEMP, JR., CHAIRMAN OF THE OKLAHOMA TAX COMMISSION; AND JERRY JOHNSON, VICE-CHAIRMAN OF THE OKLAHOMA TAX COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Petitioner's Supplemental Brief ("Supp. Br.") attempts to answer the United States' reasoned and well-grounded brief *amicus curiae* ("U.S. Br.") by repeating Petitioner's mis-characterizations of the decisions below, the record, and other circuits' decisions. The Tenth Circuit's sound application of this Court's well-developed disestablishment jurisprudence to the unique legislation and history affecting the Osage neither injects "confusion" into reservation status determinations (Supp. Br. 1) nor portends "profound political, economic, structural, societal, and practical repercussions." (Supp. Br. 2) Quite the contrary, as the United States demonstrates, it is the Osage Nation's long-delayed claim that would engender unsettling repercussions.

I. THE TENTH CIRCUIT'S ANALYSIS CONFLICTS NEITHER WITH THIS COURT'S PRECEDENTS, NOR DECISIONS OF OTHER CIRCUITS, NOR PRIOR POSITIONS OF THE UNITED STATES.

Repeating its unsupportable charges that the applicable statutes are "silent" (Supp. Br. 6), and that the Tenth Circuit employed an "entirely extra-congressional and extra-governmental analysis (Supp. Br. 7), Petitioner persists in ignoring the

provisions of the Osage Division Act, (U.S. Br. 2-4; Respondents' Brief in Opposition ("Opp. Br.") 8-13), and the contemporaneous Osage Enabling Act, (U.S. Br. 2-3, Opp. Br. 14-16), that reflect clear Congressional intent to terminate the Osage Reservation upon its incorporation into the new State of Oklahoma. As the United States recognized, when the contention that the statutes are silent as to continued reservation status is rejected, as it must be, the Petition presents no substantial question. There is no conflict with this Court's prior disestablishment decisions or with the decisions of other circuits.

Petitioner continues to mischaracterize the record below. It still labels the striking demographic change beginning immediately after the dispositive acts (1907-1910) as "modern." (*Compare* Supp. Br. 3, *with* U.S. Br. 8-9 *and* Opp. Br. 20-23). Petitioner describes undisputed facts below showing unbroken treatment of Osage County as non-reservation land for pertinent *jurisdictional* purposes, including the shift of criminal enforcement on unrestricted fee lands from federal to state officials from 1907 to the present (*see* U.S. Br. 8-9, 18-19), as "lapses or inconsistencies" in executive policies toward the Osage. (Supp. Br. 6.) Petitioner does not support this charge with examples of jurisdictional treatment of Osage County fee lands that reflect reservation status. Instead, Petitioner relies on scattered references to an Osage "reservation,"

which is a mere "convenient geographical description," *see South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356 (1998), or recent decisions that do not apply this Court's analysis and are not entitled to deference. (*See* Opp. Br. 26-28.)

1. Contrary to Petitioner's assertions (Supp. Br. 3-8), the United States correctly concluded that "the court of appeals applied the proper analytical framework for determining whether a reservation has been disestablished or diminished." (U.S. Br. 9.) The United States refutes petitioner's proposal "that the court of appeals should have ended its analysis, and entered judgment in petitioner's favor, once it determined that the statutory text did not unambiguously support disestablishment." (*See* U.S. Br. 10 (*citing* Pet. 13-14, 18.) Rather, the United States correctly observed that this "Court has rejected the application of a 'clear-statement rule' that would require Congress to employ 'any particular form of words' to express its purpose." (U.S. Br. 10 (*citing* Pet. 13-14; Pet. Reply Br. 3-4, *and quoting Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Because (1) the pertinent statutes are not silent as to continued reservation status; (2) there is no applicable "clear-statement" rule; and (3) the courts of appeals apply consistent tests, *Morrison v. National Australia Bank Ltd.*, ___ U.S. ___, 130 S. Ct. 2869, 2878 (2010) (Supp. Br. 3), does not provide guidance here.

This demand for a "clear-statement" rule, at the core of Petitioner's positions below and before this Court, bespeaks a fundamental misunderstanding of the context in which allotment era Congresses acted, and hence, of this Court's jurisprudence in this factbound setting. Given Congress' expectations during the allotment era, "Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Yankton Sioux*, 522 U.S. at 343 (quoting *Solem v. Bartlett*, 465 U.S. 463, 468 (1984)). As the United States demonstrates (U.S. Br. 5-9), the courts below reasonably examined each of the three elements of this Court's test: the statutory text, legislative history reflecting "historical context surrounding the passage of a surplus land act," and, to a lesser extent, "the subsequent treatment of the area." *Yankton Sioux*, 522 U.S. at 343, 344. Contrary to Petitioner's assertions (Supp. Br. 3), the courts below did not just "dutifully recite" this Court's disestablishment rules, but, as the United States demonstrates, they followed this "methodology." (U.S. Br. 5-9, 12)

2. Petitioner (Supp. Br. 4-7) does not rebut the United States' clear showing that no split in the circuit exists (U.S. Br. 11-15): Petitioner's "characterization of the asserted conflict misdescribes both the governing standards and the manner in which the court of appeals here applied it." (U.S. Br. 12.) As the United States

demonstrates, the Tenth Circuit's analysis does not conflict with the analysis of other circuits because the Tenth Circuit, like its sister circuits, employed "a methodology in which contemporaneous surrounding circumstances, *including* statutory history, are employed to *interpret* otherwise ambiguous text." (*Id.*) (emphasis in original). As the United States' showed, "unique statutes and different factual records" created different results, are not "quite beside the point" (Supp. Br. 8), and do not reflect a misapplication of this Court's governing legal standards. (U.S. Br. 13, 14.)

Petitioner's claim that *Bruguier v. Class*, 599 N.W.2d 364 (S.D. 1999) (Supp. Br. 4, 5), demonstrates the need for the Court to clarify its disestablishment analysis is confounded because the holding of that case, that allotted lands transferred to non-Indian ownership do not retain reservation status, does not conflict with either this Court's *Yankton Sioux* opinion or the Eight Circuit's subsequent decision on remand. First, *Bruguier*'s holding on disestablishment cannot conflict with *Yankton Sioux* because this Court did not reach that issue. *See Yankton* Sioux, 522 U.S. at 358. Second, on remand from *Yankton Sioux*, the Eighth Circuit concluded, like *Bruguier*, that "those lands originally allotted to tribal members which have passed out of Indian hands" no longer retain reservation status. *See Yankton Sioux Tribe v. Gaffey* ("*Gaffey II*"), 188 F.3d 1010, 1030 (8th Cir. 1999), *cert. denied*, 530 U.S. 1261 (2000). As

the United States' *Daugaard* briefing recognized, "[c]ontrary to petitioners' assertion of a conflict between the decision below and the Supreme Court of South Dakota's decision in *Bruguier*, the actual holdings of the two cases are identical." U.S. Opposition Br., *Daugaard v. Yankton Sioux Tribe*, Nos. 10-929, 10-931, 10-932, 10-1058 ("*Daugaard* Br.") 18-20. However, even if there were some distinction between *Bruguier* and *Gaffey II*, that distinction would not support review because it is not relevant to the unique legislation and record here.

3. Petitioner is simply wrong that the United States' position in its current brief conflicts with its briefing in other cases. (Supp. Br. 2, 6-7.) To the extent the United States' position has evolved since it filed its brief in *Yankton Sioux* in 1997, that evolution conforms to, rather than departs from, this Court's guidance in *Yankton Sioux* and other reservation status cases. *See* U.S. Amicus Curiae Br., *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) ("*Yankton* Br.")

In *Yankton Sioux*, *Daugaard*, and here, the United States has consistently urged the application of this Court's fairly clean analytical framework and has concluded that the relevant courts of appeals have applied that framework. *See* See *Yankton* Br. 8; *Daugaard* Br. 13; U.S. Br. 9-11, 12-13. Consistent with that framework, the United States has correctly acknowledged that "each case

involving whether a surplus land act has altered Indian reservation boundaries is unique, because '[t]he effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.'" *See Yankton* Br. 8 (quoting *Solem*, 465 U.S. at 469); *Daugaard* Br. 13; U.S. Br. 9, 13-14. Given the importance of these factors in discerning congressional intent, the United States has not limited its analysis to only the language of the relevant act, but has looked to contemporaneous legislation, events surrounding the enactment of the relevant act, including its legislative and negotiating history, and subsequent events and demographic trends. *See Yankton* Br. 8-29; *Daugaard* Br.13-18; U.S. Br. 9-11.

That the United States has never categorically insisted on the "all-or-nothing" approach Petitioner espouses is especially clear in the United States' *Yankton Sioux* brief. In *Yankton Sioux*, the relevant statute contained language of cession and payment of a sum certain, "hallmark" disestablishment language. *Yankton Sioux*, 522 U.S. at 344. Consistent with this Court's analytical framework, though, the United States evaluated other language in the Act, its legislative history, subsequent events, and demographic trends to argue that Congress did not intend to diminish the reservation. *Yankton* Br. 10-31.

Petitioner also contends that the United States is now departing from a prior position that other

disestablishment indicia cannot trump "countervailing evidence from Congress and the Executive Branch." (Supp. Br. 7 (quoting *Yankton* Br. 28)). The quoted language in the *Yankton Sioux* brief argued only that South Dakota's assertions of jurisdiction over the disputed lands "are not dispositive" given "countervailing evidence" that was contemporaneous with the passage of the 1894 Act (*see Yankton* Br. 20-24 (citing 1892 negotiations, congressional debates regarding 1894 Act, post-enactment Presidential proclamation), *not* recent non-jurisdictional references like those Petitioner advances here.

More to the point, here, the courts below relied on undisputed evidence indicating both Congress' intent and the Executive Branch's belief that the Osage Reservation was disestablished. Petitioner failed to provide *any* contemporaneous countervailing evidence, much less any evidence that the contemporaneous events or subsequent treatment of the land was contradictory or inconsistent. As the United States recognized (U.S. Br. 8), the historical evidence before the courts below "supported the conclusion that the Osage Reservation had been disestablished" and Petitioner "presented little, if any, historical evidence to the contrary." In fact, Petitioner's only "countervailing evidence" of the Executive Branch's position is contemporary, not contemporaneous, and thus of little, if any, value.

Contrary to Petitioner's assertion (Supp. Br. 8-9), the United States' brief *amicus curiae* in *Murphy v. Oklahoma*, 551 U.S. 1102 (2007) ("*Murphy* Br."), both reflects the Oklahoma-specific focus applicable here and supports, rather than undermines, the decisions below. Here, as in *Murphy*, a "series of Acts of Congress culminating in the grant of statehood to Oklahoma in 1906, as well as congressional action since that time," demonstrate that the former Osage reservation, like the Creek reservation in *Murphy,* was disestablished "as part of the process of allotting those lands, displacing tribal jurisdiction, and establishing the supremacy of state law and state jurisdiction." *Murphy Br.* 10. Unlike the United States' brief in *Murphy*, which concluded that the "statehood process underscores that the Creek Reservation was not preserved" (*Murphy* Br. 13), Petitioner's briefing here ignores, with the exception of a single citation to geographic references to "reservation," the intent and effect of the Oklahoma Enabling Act, passed the same month as the Osage Division Act.

4. Because this case does not present the interpretive issues Petitioner advances, the United States' is correct that: "Case-specific application of settled legal standards, focusing on distinct statutory provisions and historical circumstances does not merit this Court's review." (U.S. Br. 14). Given the unique factual and statutory background here, "granting certiorari in a case like this would

be unlikely to provide any useful guidance for future disestablishment or diminishment cases." (U.S. Br. 14; *Daugaard* Br. 13 (the Eighth Circuit "applied the standards repeatedly articulated by this Court to the particular facts and circumstances of the case. Such a fact-specific application of settled legal standards does not merit this Court's review." (citations omitted)). As the United States explained here: "Any criticism of the court of appeals' opinion would be directed at its circumstances-specific reasoning, not the legal framework it applied." (U.S. Br. 10.) Petitioner's suggestion that the *Osage* and *Yankton Sioux* petitions are related and may impact one another (Supp. Br. 13) is misplaced.

Moreover, the petitions for certiorari in *Yankton Sioux* do not challenge the *Gaffey II* court's holding that the Yankton Sioux reservation was diminished "by the loss of those lands originally allotted to tribal members which have passed out of Indian hands." *See Gaffey II*, 188 F.3d at 1030. Instead, the *Yankton Sioux* petitions challenge only the court of appeals' affirmance of the district court's conclusion that certain trust lands retain reservation status. Here, there is no dispute that trust and restricted fee lands retain their Indian country status. Given the fact-based analysis of each case, neither case will affect the other. There is no logical relationship between the cases that arguably supports Petitioner's suggestion that the

Court should grant *certiorari* here to provide additional context for the *Yankton Sioux* petitions.

II. NEITHER THE EXECUTIVE NOR CONGRESS HAS TREATED OSAGE COUNTY AS A CONTINUING RESERVATION.

Contrary to Petitioner's assertions (Supp. Br. 1), the Executive Branch and Congress have not repeatedly recognized the "continued existence" of an Osage reservation. Indeed, the acts the Petitioner cites acknowledge that the former reservation was incorporated into the State of Oklahoma as a county. The Act of March 2, 1917, Pub. L. No. 64-369, 39 Stat. 969, for example, (*see* Supp. Br. 4), declared that "all of Osage County, Oklahoma" shall be deemed Indian country for purposes of liquor control. The 1917 Act does not refer to an Osage reservation, and Petitioner does not explain why Congress would have needed to make such a declaration if it believed the Osage reservation continued to exist. Similarly, the Act of May 25, 1918, Pub. L. No. 65-159, 40 Stat. 561, §17, declared that Osage allottees may change the designation of "homesteads to an equal share of their unencumbered surplus lands" provided that "any order of change of designation shall be recorded in the proper office of Osage County," Oklahoma.

Nor do the cited portions of the 1938 Code of Federal Regulations (Supp. Br. 1) reflect jurisdictional treatment of Osage County as a reservation. Former 25 C.F.R. Part 177 (now long deleted, *see* 21 Fed. Reg. 6270, 6271 (Aug. 21, 1956)), which concerned agricultural leases, apparently never referred to an Osage "reservation." Instead, it referenced "Osage County, Oklahoma." *See* 25 C.F.R. § 177.3 (1949). 25 C.F.R. Parts 180 and 204, now renumbered as Parts 226 and 214, respectively, deal with oil, gas, and mineral leasing of the "Osage Mineral Estate," of course, "reserved" in trust for the Osage Nation and underlying Osage County.

III. THERE IS NO SOUND REASON TO ADDRESS RESERVATION STATUS STANDARDS IN THIS CASE.

1. Petitioner similarly fails to refute the United States' showing that this Court's review is unwarranted because, whether or not Osage County remains a reservation, this Court has recognized that Osage members are subject to Oklahoma income tax. Petitioner overlooks the repeated expressions of legislative intent in the Osage Division Act, the Enabling Act, and later statutes (*see* U.S. Br. 1-9) that Osage incomes be subject to state tax and misunderstands this Court's cases interpreting those acts. Petitioner's contention that *Choteau v. Burnet*, 283 U.S. 691

(1931), only affirmed the taxation in issue because the Osage Division Act "expressly authorized" taxation of lands after issuance of a certificate of competency (Pet. Supp. 11) is unsupportable. *Choteau* affirmed taxation of royalty income and proceeds of an inherited estate. *Choteau*, 283 U.S. at 692. *Choteau* holds that only "homestead" lands are not taxable; as to all other income and lands, *Choteau* confirms that Osage members are subject to taxation whenever they have "untrammeled ownership of the income in question." *Id.* at 696. Petitioner overlooks that what made the "*situation* wholly different" (Supp. Br. 12) in *United States v. Mason*, 412 U.S. 391, 396 n.7 (1973), (emphasis added), from the situation in *McClanahan v. Ariz. Tax Comm'n*, 411 U.S. 164 (1973), was not the difference between the estate tax involved in *Mason* and the state income tax in *McClanahan*; rather, Osage, involved in *Mason*, unlike the Navajo Reservation in *McClanahan*, was a "case[] where Indians have left the reservation and become assimilated into the general community." *Mason*, 412 U.S. at 396 n.7 (quoting *McClanahan*, 411 U.S. at 171).

2. It is Petitioner (Supp. Br. 2), not the United States, that fails to come to grips with the "profound political, economic, structural, societal, and practical repercussions" of the request to judicially recognize a reservation that has been considered terminated for more than a century. United States Census records for the periods from

1910 through the 2000s establish that members of the Osage Nation have consistently constituted less than 7% of the total population of Osage County. *See* Opp. Br. 20-21. From 1907 to the present, law enforcement in Osage County has been almost exclusively a State or Osage County responsibility (Opp. Br. 21-23), and the United States advised that the "federal government currently focuses its prosecutorial efforts only on trust and restricted lands." (U.S. Br. 19.)

This Court has repeatedly recognized the importance of justifiable expectations premised on longstanding jurisdictional patterns. As the Court recognized in *Hagen*, 510 U.S. at 421, the "jurisdictional history" of federal and state actions demonstrated a "practical acknowledgment" that the reservation had been diminished and "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area." As they accord weight to such "justifiable expectations," the decisions below comport with the decisions of this Court and do not warrant review. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215-16 (2005).

CONCLUSION

For the foregoing reasons, the petition for writ of *certiorari* should be denied.

Respectfully Submitted,

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